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In the Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, PETITIONER

vs.

GIACOMO VENTRESCA

RESPONDENT'S BRIEF IN OPPOSITION TO SOLICITOR GENERAL'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

EDWARD C. MAHER
MATTHEW R. McCANN
340 Main Street
Worcester, Massachusetts
Attorneys for Respondent

MAHER, McCANN & TALCOTT
340 Main Street
Worcester, Massachusetts
Of Counsel

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 782

UNITED STATES OF AMERICA, PETITIONER

vs.

GIACOMO VENTRESCA

RESPONDENT'S BRIEF IN OPPOSITION TO SOLICITOR GENERAL'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT OF THE CASE

The Solicitor General, has asked that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit reversing respondent's conviction for possessing and operating an illegal distillery and for conspiracy to do so.

The opinion of the court of appeals is set forth in the Appendix to the Government's Petition (pp. 10-22).[1]

The facts, well summarized in the decision of the Court below, indicate that the respondent Ventresca was arrested in his home on September 1, 1961 following a search and seizure by government investigators attached to the Alcohol and Tobacco Tax Division of the Internal Revenue Service; that prior to trial the defendant filed a

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[1] References herein to the Government's Petition for a Writ of Certiorari will be shown as "Pet. for W/C".

motion for the return of seized property and the suppression of evidence obtained through the execution of the search warrant; and that after receiving evidence on the motion, the district court ruled that the affidavit was sufficient under the test promulgated by the Supreme Court in *Jones* v. *United States*, 362 U.S. 257 (1960). Ordered suppressed as evidence, however, were a telephone book, desk directory and various papers taken from a box on Ventresca's bedroom bureau and from his trouser pocket on the ground that they were mere evidence and, therefore, not within the provision of Rule 41(b)(2) of the Fed. Rules of Criminal Procedure.

The principal question raised by the respondent in the district court and again in the court of appeals was the sufficiency of an affidavit signed by one Mazaka, an Investigator attached to the Alcohol and Tobacco Tax Division of the Internal Revenue Service, which affidavit was the sole evidence upon which the search warrant was issued.

The affidavit is set out in full in footnote #2 of the Circuit Court decision (Pet. for W/C pp. 11-15).

The First Circuit, in reversing respondent's conviction, held that the affidavit was inadequate and that all evidence obtained pursuant thereto should have been suppressed.

ARGUMENT

1. Reasons Advanced by Petitioner In Support of Its Position

The Solicitor General's petition prays that certiorari be granted for what appear to be two reasons: first, that the decision below stemmed from "an unduly technical and clearly erroneous interpretation of the affidavit upon which the search warrant was issued" (Pet. for W/C, pp. 5-6) in that it rejected hearsay evidence of government in-

vestigators; and second, that it was in conflict with other federal decisions which validate warrants issued solely on an affidavit as to odor or noise emanating from the premises (Pet. for W/C pp. 7-8).

In so arguing, the government has leaped to the conclusion that the matters allegedly relayed to the affiant by the government investigators were, as to the latter, matters of personal knowledge. But the affidavit did not so show, and the court of appeals declined to so assume.

Further, although some decisions have approved search warrants on a representation under oath that the affiant detected an odor of mash or narcotics as the case may be, this is not to say that every affidavit based on odor should qualify, particularly those based on hearsay.

2. This Is Not A Case for 'Certiorari'

The respondent does not think that either of the two reasons advanced by the government are well founded. Subsequent portions of this brief will cover these two points in more detail.

Suffice to say, the respondent does not regard the decision below as in conflict with other federal decisions, nor does he agree with petitioner's contention that it was unduly technical, legalistic, evasive, subtle, or that it 'caviled' over the meaning of a single word. The decision was basic, clear, and unambiguous.

The Solicitor General apparently hopes that by calling the lower court names he can tease this court into granting certiorari and thereby get a second shot at the issues of law involved. But the degree of madness or frustration on the part of the government's attorneys is not the test. There is no need or justification for a Writ of Certiorari.

3. The Affidavit Was Plainly Insufficient

A. *The test*

Ordinarily an affidavit is a statement of fact by a person under oath as to matters of personal knowledge. Otherwise, it is difficult to comprehend how an oath can safely be taken. This does not rule out, however, the possibility of an affidavit based wholly or partly on hearsay.

In *Jones* v. *United States*, 362 U.S. 257 (1960) the Court said (p. 269):

> "The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, *so long as a substantial basis for crediting the hearsay is presented.*" (underscoring supplied)

The rules of the *Jones case* has not been interpreted as an unqualified acceptance of hearsay affidavits. Something more must be shown. In *United States* v. *Ramirez*, 279 F. 2d 712, 715 (C.A. 2, 1960) appears the following:

> "*Jones* v. *U.S.* . . . has now established that an affidavit consisting primarily of hearsay information may be sufficient to support the issuance of a search warrant. However, the requirement that the affiant shall have personal knowledge still exists, for under Jones, the affiant must not only believe the hearsay report but in all likelihood the affiant must further demonstrate that his informant has established a reputation for reliability so as to be worthy of belief. *In addition Jones may require that the affidavit include some factual information independently corrobative of the hearsay report*". (underscoring supplied).

B. *The affidavit was total hearsay*

In the first paragraph of the affidavit the affiant stated that it was ". . . based on observations made by me and . . . upon information received officially from other Investigators . . ." In the last paragraph, the affiant stated, somewhat inconsistently that it was ". . . . based upon personal knowledge and information which has been obtained from Investigators . . ." It could well be that the only fact personally known to the affiant was the defendant's address. Confronted with this situation, the court of appeals said:

> "The affidavit failed to clearly indicate which of the facts alleged therein were hearsay or which were within the affiant's own knowledge. Although the affiant claims part of the information to be based upon 'personal knowledge and information,' it is stated that such 'personal knowledge and information' was obtained from other Investigators."
>
> "Limited to the four corners of the affidavit, there was no way for the Commissioner to determine how much of the factual recitation was based on hearsay and how much was based on personal knowledge of the affiant. It could well be that none of the essential facts set forth in the affidavit were actually witnessed or established by the affiant. The Commissioner could only conclude that the entire affidavit was based on hearsay". (Pet. for W/C p. 16).

C. *The source and reliability of the hearsay was not established.*

Not only were the so-called government investigators nameless and faceless, the affidavit gave no assurance that the matters reported to the affiant by the so-called investigators were observed by them. At the most we have an affidavit by the affiant that he heard something from investigators who themselves had come upon the informa-

tion in the course of an investigation. As to this, the court of appeals said:

> "Thus, the affidavit leaves as a complete mystery the manner in which the Investigators discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term 'investigation' are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants, the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit alone, but the distinct possibility of hearsay-upon-hearsay." (Pet. for W/C p. 18-19).

A similar holding on a somewhat similar set of facts is found in *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2, 1960) (appeal later dismissed on procedural grounds, 369 U.S. 121). It was held that an arrest warrant had issued illegally on the basis of an insufficient complaint (seizure of goods sustained on other grounds). The complaint contained language very much like the affidavit in the instant case, to wit:

> "That the source of your deponent's information and the grounds for his belief are your deponent's personal observations in this case, the statements of Samual Panzarella and other witnesses in this case, and the reports and records of the Bureau of Narcotics."

In striking down the warrant for arrest, the Court said (at p. 900):

> "It is particularly deficient in setting forth the sources of his information or grounds for his belief. True, it recites that his belief an offense had been

committed was grounded on his 'personal observations in this case, the statements of Samuel Panzarella and other witnesses in this case, and the reports and records of the Bureau of Narcotics' but what other sources could there possibly be? Such a shotgun, all encompassing, enumeration is no better than none at all. There is no indication of what he had personally observed, what he had heard from others or what he learned from the reports and records of the Bureau of Narcotics. Neither is there presented the basis for crediting the hearsay of the nameless other witnesses or the unidentified reports and records. The complaint is no better than that in *Giordenello* v. *United States*, and the warrant is invalid for the same reasons."

Assuming for the sake of argument that there was no hearsay upon hearsay and that those who reported the facts to the affiant observed them first hand, the affiant still did not identify the sources of his information other than to say it came from investigators. This deficiency is not always fatal, as in cases where there is other substantiation for crediting the hearsay, but where there is nothing but the hearsay as defendant contends is the case here, it becomes necessary to know something about the person or persons on whom the affiant has relied.

Although he says he received his information from investigators attached to the Alcohol and Tobacco Tax Division, he does not identify them by name or other description. He assumes a judicial finding as to their reliability without judicial strain. Nothing is said as to who they were, whether full time or 'ad hoc' employees, whether new or old in the service, whether well known to the affiant or not, whether attached to the same division as the affiant or not, or whether found to be reliable in the past or not. His form of affidavit necessitates a judicial determination that the hearsay of these individuals owes its substantial basis for credibility to the mere fact that these people are employees of the government as-

signed, in this case, to the same type of work as is the affiant.

D. *The petitioner has misinterpreted portions of the affidavit.*

In that portion of the Government's petition entitled "Question Presented", two statements are made which the respondent says are incorrect. One, the petition claims that the affidavit said that the "Investigators of the Alcohol and Tobacco Tax Division" made "personal" observations. The affidavit did not state that their observations were "personal" and therein lay the problem. True in one instance the affiant said the affidavit was "based upon personal knowledge and information . . . obtained from" others (Pet. for W/C, ftn. p. 15), but this is a contradiction in terms.

Two, the petition states that an inference was drawn by the court below that information obtained from investigation may have included unreliable as well as reliable data, but that this inference was negated by the concluding sentence of the affidavit. The respondent fails to see how said concluding sentence negates the inference. Rather it supports it, for to say that the information was obtained from investigators doesn't show where they got it.

The petition states that even though some of the detailed observations in the affidavit could be regarded as having come from persons other than (government) investigators, information given with this kind of 'specificity' would be entitled to credence (Pet. for W/C p. 6). This is a novel proposition. It would dispense with the need of verification in any case where the yarn appears well spun. It suggests that the truth of the facts depends on how true they appear to be, and that if they clearly appear to be true, they must be true.

The petition (p. 6) says "there can be no doubt that the affidavit relected the personal observations of a number of investigators of the Division rather than observations made by unknown informants." But it was precisely this doubt on which the decision of the lower court turned.

E. *The affidavit was anonymous*

The rights of a property owner, not yet a defendant in any criminal action, are not to be lightly regarded. The authorities are replete with historical explanations as to why the Fourth Amendment was phrased in such rigid language. See *Henry* v. *United States*, 361 U.S. 98 (1959). It takes little imagination to picture what must have been the state of mind of the delegates to the constitutional convention in the formative years of this country. These men are still seared with the scars of a revolutionary war against their mother country begun in 1775 at great personal peril and risk to themselves. The indignities they had suffered under colonial rule had pushed them to the breaking point. It was to throw off tyranny in all forms that the war had been conceived, not only the tyranny of peremptory search and seizure, but that of involuntary quartering and feeding of troops, of a subjugated press, of insufficient home rule, and the like.

In drawing up the Fourth Amendment, one thing was to be certain. No one's home was to be invaded in the name of law or government unless some individual was prepared to accept full responsibility by going before a proper magistrate and swearing under oath as to the existence of facts sufficient to constitute probable cause.

How chagrined would be the government if after a brutal entry the search should turn up nothing, then to find that the individual responsible for the whole matter had relied solely on what others had told him and knew nothing about it himself.

In the instant case the affiant could well know nothing, and those on whom he relied for information, being unnamed and unnumbered, could hardly be brought to account. The affidavit was anonymous. For all that the U.S. Commissioner would know the affidavit could well have been drawn by a swivel-chair government bureau head from the collective contents of his office files.

The respondent contends that this was not what was contemplated by the framers of the Fourth Amendment.

True, a defendant can understand the reluctance of a governmental agency to disclose in advance of trial the names and identities of the parties to utter testimony against him. Nowhere in this case, either in the affidavit supporting the search warrant or in the recitation of overt acts supporting the conspiracy indictment, is there any indication as to where or from whom the government obtained its information leading to the issuance of the search warrant.

The defendant of course does not know whether the affidavit was loosely and sloppily drawn, or whether it was artfully drawn for the purpose of keeping the defendant uninformed until the date of trial. But the competitive aspects of trial practice with its attendant strategies on both sides should not be permitted to minimize the government's responsibilities in the pre-trial stages of search and seizure.

4. The Decision Below Was Not In Conflict With Other Federal Courts

The government's petition (pp. 7-8) says that "to conclude . . . that the affidavit was defective is to reach a result in direct conflict with *Monette* v. *United States*, 299 F. 2d 847 (C.A. 5, 1962), which held that the distinctive odor of fermenting mash is alone sufficient to justify issuance of a warrant to search a dwelling." On the same point the petitioner also cites *Johnson* v. *United States*,

333 U.S. 10 and *Chapman* v. *United States*, 365 U.S. 610 (Pet. for W/C pp. 7-8).

The respondent has read the cases and does not agree.

In the *Monette case*, supra, the affiant (Norman R. Hilledge) stated that he was "an enforcement agent with the Florida State Beverage Department" and that *he* "distinctly smelled the odor of fermenting mash emanating from the premises". (Affidavit set out in footnote #3 of decision on p. 849). In other words, the person alleged to have smelled the odor was identified as the affiant. In the case at bar the investigators alleged to have smelled the odors or heard the noises were not shown to include the affiant, nor were they even referred to by name.

In the *Johnson case*, supra, a search of premises was held invalid for failure of the officers to first obtain a search warrant. The Court did hold with certain qualifications, that mere evidence of odors would be sufficient to justify issuance of a search warrant. The Court said:

> "If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant."

But this of course did not pass upon the question of a hearsay affidavit. And the court in the *Johnson case*, had before it for consideration a set of facts in which the party detecting the odor was an unnamed and faceless investigator.

In the *Chapman case*, supra, the Court's attention was focused upon the problem of a search without a warrant after government officers detected an odor of mash. Although the Court held the officers should have sought a warrant, the case cannot be cited as an authority that

the smell of mash is enough in itself, for there was neither decision nor distinction on this point.

The more logical position on this issue would seem to be the one taken by Judge Aldrich of the First Circuit, that given an affidavit which fails to satisfy the most fundamental requirements of the Fourth Amendment when viewed as a whole, it serves no good purpose to knit-pick through its contents in search of an iota or two which might conceivably sustain it.

In the footnote on p. 7 of the petition, the Solicitor General says that Judge Aldrich's concurring opinion suggests that "the affidavit will fall if any of its averments are insufficient to support the warrant", and the Solicitor then cites cases to disprove this point. Obviously, Judge Aldrich suggested no such thing. His concern was not with the "barrow-load" of allegations that may be insufficient, but with the value and the strength, if at all, of those allegations that would in some instances be sufficient.

Conclusion

In his Conclusion (Pet. for W/C pp. 8-9) the Solicitor General complains that he is being asked to comply with "hypertechnical requirements", and he has charged the court below with "cavilling over the meaning of a single word when the sense is plain".

The respondent does not view the problem that simply. Although the Government has its fair share of earthly burdens, so too the people have theirs. And the purpose and intent of the Fourth Amendment should not be watered down or put in jeopardy by affidavits that either do not meet the test, or which do meet the test but fail to show that they do, lest individuals be deprived of the security and privacy of their homes and eventually their personal liberty.

This was no wishy-washy decision. The majority opinion of Judge Hartigan rings clear in unequivocal language. And so confident was Judge Aldrich of the rightness of his vote, that he filed a concurring opinion for the purpose of taking issue with the dissent of Judge Woodbury.

It is not adequate reason for a Writ of Certiorari to say that the lower court should have overlooked the deficiencies of the affidavit, but did not, and that the Supreme Court of the land should now do so.

The petition for a Writ of Certiorari should be denied.

GIACOMO VENTRESCA

By: EDWARD C. MAHER

MATTHEW R. MCCANN
340 Main Street
Worcester, Massachusetts
Attorneys for Respondent

MAHER, MCCANN & TALCOTT
340 Main Street
Worcester, Massachusetts
Of Counsel